

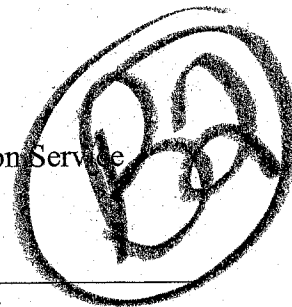


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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:

Office: California Service Center

Date:

FEB 05 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the beneficiary's sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if

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(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term 'extraordinary ability' means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as an assistant audio designer. On appeal, counsel asserts that the director erred by concluding that the beneficiary would not substantially benefit the United States. Counsel cites a letter from a Service official asserting that specific evidence is not required for that provision. Counsel's argument is not persuasive. The director did not conclude that the beneficiary was otherwise eligible but had not specifically addressed the substantial prospective benefit provision. Rather, the focus of the director's argument is that, until recently, the beneficiary worked as a radio host. The beneficiary

intends to enter the United States to work as an assistant audio designer. Thus, the director concluded that the petitioner had not established that the beneficiary intended to work in his area of expertise and, thus, could not establish that he would substantially benefit the United States. We find this concern to be a legitimate one. Success in one area is no guarantee of success in a related area of the same field. For example, while Michael Jordan is an extraordinary athlete, his success at basketball would be no guarantee of his success at baseball, a related area within the field of athletics. Thus, in evaluating the evidence of acclaim below we will consider whether it demonstrates acclaim as a radio host personality or as a sound editor.

The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence claimed to meet the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner asserts that the beneficiary meets this criterion as he was "personally nominated" for the Golden Reel Award nomination and "can take credit for" the Academy Award Sound nomination for his work on the film *Cast Away*. The petitioner does not indicate that *Cast Away* won either award.¹ Somewhat ambiguously, the director concluded that these recent nominations "were an achievement in the beneficiary's present field," but were not indicative of sustained national or international acclaim since the beneficiary had, until recently, been working as a radio show host. Counsel does not specifically address this criterion on appeal other than to assert that the director's conclusion was in error.

Regardless of whether the beneficiary recently worked as a radio show host, we do not find that the award nominations for a film on which he worked fulfill this criterion. While the Motion Picture Sound Editor's Guild that issues the Golden Reel Award did list the beneficiary on its web page announcing the nominees, the beneficiary is not singled out personally or even listed among a very few select sound editors. Rather, the web page lists the film's producers, director, supervising sound editors, supervising foley editors, sound editors, assistant sound editors (of which the beneficiary is one of two), foley artists, re-recording mixers, foley mixer, and foley recordist. Moreover, as stated above, the record does not reveal that *Cast Away* won this award. The plain language of the regulation requires an award or prize, not mere nomination for such an award or prize.

¹ According to oscars.org/73academyawards/winners/index.html and [lostmind.100megsfree2.com/year/2000/2000 mpse.html](http://lostmind.100megsfree2.com/year/2000/2000%20mpse.html), *Gladiator* won both the Golden Reel and the Academy Award for Sound.

While a personal nomination for an Academy Award does raise the nominee's recognition due to the immense prestige of the nomination itself and the publicity generated by such a nomination, the petitioner does not provide any information regarding the individuals from *Cast Away* nominated for the Academy Award.² Thus, the record does not reflect that the petitioner was personally nominated for the award. We cannot conclude that every unnamed assistant who works on a film that is nominated for an award in his area meets this criterion.

Finally, in a letter submitted on appeal, [REDACTED] asserts that the beneficiary worked as a "researcher and reporter" for the [REDACTED] Live program broadcast on BBC Radio Scotland. According to [REDACTED] the beneficiary "produced and reported on numerous interviews" for the BBC. The show apparently won a Sony Gold Award in 1994. [REDACTED] the President of KHBG radio, asserts that this is a "major internationally recognized award," and "British radio's equivalent of the Emmy Awards in the United States." [REDACTED] does not explain how he has firsthand knowledge of the award's significance. Regardless, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record contains no evidence of the award's significance, such as press coverage, or evidence that the beneficiary personally received the award.³

Moreover, the record reflects that the beneficiary was a "researcher and reporter" for the show. The role he played in producing interviews is not explained. Counsel argues on appeal that radio work and film sound editing are sufficiently related since radio personalities allegedly perform some engineering duties. [REDACTED] a producer for the nationally syndicated⁴ [REDACTED] in the Morning" program, asserts that while at KHBG, the beneficiary created commercials, imaged the sound of the station, wrote promotional scripts, and spent time in the production studio recording, editing, and mixing sounds and music for on-air use. [REDACTED] asserts that his own background is similar to that of the beneficiary's.

Even if true, the bases of acclaim for radio show hosts and film sound designers are completely unrelated. A radio show reporter or host who does his own sound editing still ultimately derives his acclaim from his interviewing skills and personality. For example, the host of National Public Radio's "Fresh Air," [REDACTED] is not known for her abilities as a sound designer/editor, but her ability to interview her guests. On the other extreme, but in a similar vein, [REDACTED] probably

² According to www.littlegoldenguy.com/nominations.asp?catid=113, the individuals nominated for the Academy Award for Sound for their work on *Cast Away* were [REDACTED]

[REDACTED] is not listed in the Golden Reel credits, but the others were all re-recording mixers. The beneficiary was not listed as a nominee and, according to the record, was one of two assistant sound editors for the film.

³ The petitioner did not submit evidence of the award itself on appeal. The award certificate is contained in the record, however. The certificate does not mention the beneficiary by name. Instead, the certificate appears to be awarded [REDACTED] as "presenter" of the program.

⁴ That [REDACTED] in the Morning" is nationally syndicated suggests that even in the field of morning talk show hosts, the top of the field is higher than that attained by the beneficiary.

ability to interview her guests. On the other extreme, but in a similar vein, [REDACTED] probably the most well-known radio personality, derives all of his acclaim, positive or negative, from his unique personality. A sound editor, however, derives his acclaim from recognition of his sound designs and editing and the resulting effects.

The above distinction clearly applies to the beneficiary's own alleged acclaim. The petitioner was both the production director and radio show host for KHBG radio in Healdsburg, California. The petitioner submits a KHBG press release regarding a publicity stunt that the beneficiary and his radio show co-host pulled, pretending they were about to be fired, and the response from listeners. All of the listeners comment on the beneficiary's on-air personality, not his ability to edit the sound of the show. As such, it is clear that any acclaim the beneficiary enjoyed from his work with KHBG resulted from his on-air personality, not his sound editing work for the station.

As the petitioner has not established that the beneficiary personally won the Sony Gold Award, that the award was significant, or that the award was based on the beneficiary's skill at sound editing, we cannot conclude that that award serves to meet this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

As noted by the director, the petitioner did not address this criterion initially. Counsel does not challenge this conclusion on appeal and we concur with the director.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

Initially, the petitioner submitted an article about [REDACTED] work on *Cast Away in Mix*. The director noted that the article was not specifically about the beneficiary, with the only mention of the beneficiary in a footnote expressing appreciation for the beneficiary's "fact check" assistance. Counsel does not challenge this specific determination on appeal, and we concur with the director. Counsel does, however, assert that the materials submitted in support of the previously approved petition should be considered. In general, a petition must be evaluated on its own record of proceedings. In this case, however, counsel resubmits these materials on appeal.

The petitioner submits an article in *The Bridge Marketplace News*, published by the radio station at which the beneficiary worked, discussing the rising popularity of the station in Sonoma County, California, including the beneficiary's "Breakfast Show." The record also reflects that the *Healdsburg Tribune*, a local California paper, covered the beneficiary's acceptance of a water aerobics challenge and his celebration of the Feast of Saint Andrew. Finally, the *East Fife Mail* noted the beneficiary's American career. The record contains no evidence regarding the circulation of the *East Fife Mail*. None of the above articles appear to have been published in major media.

As such, even if we considered the beneficiary's alleged acclaim as a radio show host, he would not meet this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

As stated by the director, the petitioner did not initially claim that the beneficiary met this criterion. On appeal, counsel asserts that the beneficiary now meets it. The petitioner submits a letter from [REDACTED] Executive Director of the National Teen Leadership Program, thanking the beneficiary for participating as an interview judge at St. Mary's College. It is not clear what services the interview judges performed or how they were selected. The record does not establish that the beneficiary was judging the sound editing skills of these teens or even a related or "allied" skill. Regardless, the beneficiary performed these services in August 2001, well after the date of filing. As such, it cannot be considered evidence of the beneficiary's eligibility as of that date. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In April 2001, the beneficiary served as a panelist at a Careers in Filmmaking panel at the University of California (UC), Berkeley. Serving as a career panelist is not the same as serving on a panel of judges. The record contains no evidence that the beneficiary judged the work of others at this career forum. In addition, it is not clear how the university chose its panelists. Further, the beneficiary served on this panel one month after the petition was filed.

Finally, the petitioner submitted a letter from [REDACTED] a graduate film student at UC, Berkeley. [REDACTED] asserts that he met the beneficiary during an internship at the petitioning company and asked the beneficiary to judge the second annual Outhouse Film and Video Festival organized by the Louisiana State University (LSU) Cinema Club. [REDACTED] further asserts that the beneficiary accepted and served as a judge in April 2001. Once again, the judging took place after the date of filing. Moreover, [REDACTED] asked the beneficiary to serve as judge based on his personal acquaintance with the beneficiary. Such an invitation is not evidence of national or international acclaim. Furthermore, in an earlier letter from [REDACTED] to the beneficiary submitted initially, [REDACTED] merely invites the beneficiary to be a "guest seminar leader" and give a one-hour presentation, not to judge the films.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The petitioner initially claimed that the beneficiary met this criterion based on his position as production director of a radio drama for the Marin Literacy program, his invitations to serve as a panelist at UC Berkeley and speak at LSU, and by serving as a volunteer teacher at KWMR radio station.

The director concluded that these activities could not be considered contributions of major significance to the field. Counsel does not challenge this assertion on appeal and we agree that philanthropic activities, while laudable, are not necessarily evidence of a contribution to the field.

itself. The director further concluded that the beneficiary's work on *Final Fantasy* could not be considered because the credits for this film had not yet been issued. On appeal, counsel notes that the credits have now been issued and list the beneficiary as the sole assistant sound designer. In addition, counsel notes that the beneficiary had already appeared in the credits for *Cast Away*, which the director did not consider under this criterion.

Initially, the petitioner submitted a letter from [REDACTED] asserting that the beneficiary was working on [REDACTED] as assistant sound designer and would receive on-screen credit. [REDACTED] asserted that the beneficiary was working as the assistant sound designer for *Final Fantasy* and would receive on-screen credit. [REDACTED] and [REDACTED] do not explain how the beneficiary's work on this film was a contribution of major significance to the sound-editing field as a whole.

On appeal, counsel asserts that screen credit is "a very significant sign of recognition within the industry and is much sought after by all technical individuals involved with major film production." Counsel further states that both the director and the studio producing the film must agree to the credit list.

In a new letter, [REDACTED] asserts that the beneficiary's skills have been indispensable and that a similarly skilled American would be very difficult to find. These general assertions do not explain how the beneficiary has made a major contribution to his field. [REDACTED] a sound designer and re-recording mixer, further indicates that he has been nominated for eight Academy Awards, a Grammy and an Emmy, winning an Academy Award for *The Right Stuff*. [REDACTED] is also a member of the Academy of Motion Picture Arts and Sciences. [REDACTED] job title and his accomplishment reflect that the top of the beneficiary's field is higher than the level he has attained.

The petitioner submitted an amateur review of *Final Fantasy* from Amazon.com and a book on the making of *Final Fantasy* that comment on the animation, but fail to indicate that the sound for the film was groundbreaking.

The implication of counsel's argument appears to be that any technical staff member who obtains screen credit has made a contribution of major significance to his field. We do not agree. Several major movies are released each year and each movie has several technical staff members listed in the credits. We cannot conclude that each credited member of the staff of every major motion picture has earned a place in the credits by making a major contribution to the field in general. As stated above, none of the evidence in the record identifies a specific contribution to the field of sound design/editing that has been emulated by other designers/editors or other studios.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

As stated by the director, the petitioner did not initially submit evidence regarding this criterion. On appeal, the petitioner submitted a 1997 "Forum" article by the beneficiary in *Radio and Production*. The article offers the beneficiary's personal reflections on how editing has changed with

technology. By definition, "scholarly" articles aim to teach the reader. An example of a scholarly article in the beneficiary's field would presumably provide the reader with information about new and experimental techniques and how to utilize them. A "Forum" section is for open discussion. In general, the articles in such a section are not primarily "scholarly." More specifically, the beneficiary's article does not discuss any innovative methods or explain any unique techniques. There is no evidence that this article was particularly influential. In light of the above, the beneficiary's article is not "scholarly" and cannot serve to meet this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

Initially, the petitioner specifically asserted that the beneficiary met this criterion through his position at the petitioning company, an Academy Award winning facility. The director concluded that while the petitioning company has a distinguished reputation, the beneficiary did not play a leading or critical role for that company. On appeal, counsel asserts that the director erred in considering the beneficiary's role for the petitioning company under this criterion since the beneficiary is not a performing artist. We do not find that the director erred in considering an argument specifically raised by the petitioner. Moreover, we do not find that the use of the word "performed" in this criterion restricts it to performing artists. We concur with the director, however, that an assistant sound editor does not play a leading or critical role for the petitioning company as a whole. We note that the credits for *Cast Away* include two layers above the beneficiary, three sound editors and two supervising sound editors.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The director concluded that the petitioner had not provided evidence of how his salary compares with other top-level members of his field. Counsel does not challenge this conclusion on appeal and we concur with the director.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The director acknowledged that *Cast Away* enjoyed significant commercial success, but that the beneficiary did "not have sustained national or international acclaim as a participant in the said field." Insofar as the petitioner has not demonstrated that the beneficiary's role as an assistant sound editor contributed significantly to the commercial success of *Cast Away*, we concur with the director.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as an assistant audio designer to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as an assistant audio designer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.